OFFICE OF MILITARY GOVERNMENT FOR GERMANY (U.S.)
ECONOMICS DIVISION
Decartelization Branch
APO 742

22 December 1947

MEMORANDUM

SUBJECT : A. Status of the Decartelization Program, U.S. Zone
B. Policy Questions and Determinations

1. It is the purpose of this memorandum to advise the Military Governor and the Director of Economics Division of the status of the decartelization program in the U.S. Zone, and also to a degree in the Combined Zones, and to present certain problems and questions on which clarification is considered necessary.

A. Present Status of Program

(1) U.S. Military Government Law No. 56, implemented by Regulation No. 1, was promulgated 12 February 1947 and similar action was taken in the British Zone by the promulgation of British Military Government Ordinance No. 78. As various decentralization proceedings were prepared for issuance, and plans were made for the institution of a large number of Cease and Desist Orders against trade practices that are considered illegal under the two Military Government laws, it was found necessary to cause an amended Regulation No. 1 to be prepared to provide procedures for administrative hearings and appellate procedures. The actual preparation of this Regulation has been in progress for in excess of three months. In view of the fact that bipartite action is required, in accordance with General Order No. 35 dated 16 April 1947, it has been essential to coordinate very closely with the British Decartelization Branch so that not only there could be agreement but joint and concurrent promulgation. On the U.S. side, the Regulation has been long since concurred in by the Legal Division of OMGUS and is ready for promulgation, and arrangements have been made with the Office of the Chief of Staff so that it may be quickly cleared as soon as promulgation is authorized.

(2) On the British side, the Regulation has been submitted to the Deputy Military Governor who has been unwilling, so far, to direct its promulgation until certain policy matters have been established. Among the policy questions to be determined on the British side are, first, whether or not CCG is willing to commit itself to the formal partaking in a bipartite decartelization program, in view of the fact that the British Element did not wish to commit itself to an extended decartelization program in conjunction with the Soviets in a quadripartite activity. In other words, the British were unwilling to commit themselves as being part of a definite formal Bipartite Decartelization Commission for fear that it would be a precedent in event that there should be such a commission proposed on a quadripartite basis. The British Chief of Decartelization and Control Branch states that he will be able to have an answer to this question within a short time after the return of the British Military Governor to Berlin. The second policy question of the British is that connected with the implementation of any decartelization program for the promulgation of the Regulation will require a greatly supplemented staff to carry out the decartelization work in the same manner as it is being maintained on the U.S. side. This point is likewise being brought to the attention of the British Military Governor, and the British Chief of Decartelization and Control has stated that he will report on the British policy within the next few days.

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(3) The obvious intention of General Order No. 35 is to provide for the elements of the Bipartite Decartelization Commission to work so closely together as to be almost an integrated organization. The present conception of the two Decartelization Branches is to consider the integration so close that any decartelization proceedings involving more than one Land of the Combined Zones will be instituted and maintained by the Bipartite Decartelization Commission.

(4) In addition to the Regulations above referred to, the two Decartelization Branches have agreed upon a standard procedure to be followed in all deconcentration actions. A copy of this agreement providing such procedure, dated 5 December is hereto annexed (Tab A). The procedure is designed to provide enterprises an adequate administrative hearing as well as an appeal from orders of the Decartelization Branches.

(5) In addition, prior to initiating deconcentration action, provision has been made to secure the opinions of interested agencies of both Military Governments concerning other Military Government objectives which may delay or prevent final action. This will be secured informally through carrier-sheet submission. After the first Determination and Directive has issued in each case, the enterprise is provided an administrative hearing during which it may contest the case and propose alternatives to the Directive. At conclus ion of the hearings, and submission of a plan by the enterprise, a Final Determination and Order will be prepared by BIDEC.

(6) The procedure outlined provides that a Board of Survey, bipartite in character, shall examine all proposed Final Determinations and Orders prior to issuance, to determine whether other Military Government objectives stand in the way of such proposed action. In event of disagreement by the Board of Survey, the matter will be submitted to the Bipartite Board for decision. The approved Order, after service on the enterprise, is then subject to appeals to the Bipartite Board of Appeals which will determine whether the Order is in conformity with the decartelization laws.

(7) It is presumed that the decision of the Board of Appeals is to be subject to review by the Military Governors as are all other Military Government judicial decisions. This points to one awkwardness of the outlined procedure, namely, that the matter may be brought to the Military Governors on two separate occasions: first, in event of disagreement by the Board of Survey concerning Military Government objectives which might bar the proposed action; secondly, after later decision of the Board of Appeals concerning the application of Law No. 56 and Ordinance No. 78. (It is also of some consequence that until the Board of Appeals has approved or modified an Order, as proper under the Law, it is rather academic to ask the Board of Survey and the Bipartite Board to rule whether the "proposed order" runs counter to other Military Government objectives.) This awkwardness and waste of effort can be avoided b y placing the action of the Board of Survey subsequent in time to that of the Board of Appeals. Thus, there would be only <u>one</u> occasion on which a case might be reviewed by the Military Governor. In addition, the Board of Survey and the Military Governor would avoid waste of time in reviewing the proposed action in its relation to other Military Government objectives, and would have the advantage of ruling upon a Final Order only after it had survived any modification or cancellation on strictly legal grounds by the Board of Appeals.

(8) This modification of procedure has another advantage in that it will keep the functions of the Board of Survey and the Board of Appeals clearly separate. Unless this separation of function is maintained, the right of an enterprise to its appeal will become a sham, and the burden on the Board of Survey and the Military Governors will be inordinately great.

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Status of Pending Actions

(9) It has been decided both by the Acting Director of the Economics Division of OMGUS and by members ofBIDEC that it would be inadvisable to issue any decentralization action or Cease and Desist Orders against improper trade practices until after the Regulations have been promulgated. The reasons for this decision are that: (a) there may be a delay in the issue of the Regulations; (b) a change may be made in the Regulations which might affect the form of the Determination and Directive; and (c) the subject enterprise, upon receipt of the Determination and Directive and prior to the receipt of a copy of the Regulations, might either follow the procedure of the old regulations or claim that it had a right to follow the original procedure which is quite different from the procedure set up in the amended Regulations.

(10) The Determination and Directive prepared by the U.S. Decartelization Branch has been agreed upon by BIDEC for issuance against the Henschel Combine, and can be issued at any moment, as and when the Regulations are promulgated. A Determination and Directive is substantially ready against Robert Bosch, GmbH, and likewise against Gutehoffnungshuette, both also having been prepared by the U.S. Decartel ization Branch, and are in the hands of the British Chief of Decartelization for concurrence. The two latter drafts of the Determinations and Directives have not been concurred in by the other agencies of OMGUS, due to the fact that we are waiting first for the British concurrence.

(11) In addition to the above, several Orders to Show Cause prior to the issuance of Cease and Desist Orders against illegal trade practices are substantially ready for issuance. Likewise, a number of similar proceedings are substantially ready requiring the termination of contracts illegal under the decartelization laws. Many other steps in the decartelization program, including proposed legislation precluding holding companies, interlocking directorates, decentralization of the motion picture industry, decentralization of the great insurance companies, are all well advanced, and if concurrences can be obtained, will be under way shortly.

(12) It must be stated that almost exclusively all work pertaining to deconcentration actions and trade practices cases is being carried out by the American element. The British are hopelessly understaffed and are not taking any active part in the preparation of any of the decartelization proceedings, with the sole exception of the problem of decentralizing the great insurance concerns, which is a matter of interest to even the Soviets and French.

(13) In summary, therefore, it can be stated that as soon as the Regulations are in fact promulgated on both s ides, there will be considerable decartelization activity in a far more apparent manner than has existed in the past.

B. Policy Questions

(1) The decartelization program obviously must be carried on in close coordination with the other aims of Military Government. Other elements of Military Government, perheps most specifically the Industry Branch, constantly express apprehension of the effect of the decartelization program on their particuler activity and responsibility.

(2) The necessity for bipartite and, perhaps integrated action in decartelization, practically requires a common policy between CCG and OMGUS. The British concept of the question, as expressed by the British Chief of the Decartelization and Control Branch, has been that the primary purpose of the decartelization program is one of security, and the indication has been received from him that the establishment of a c ompetitive economy for Germany, as such, is entirely secondary at most.

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(3) It is the view of the Decartelization Branch of OMGUS that under the applicable directives, especially that of 15 July 1947, we have the obligation not only of terminating cartels and cartel-like organizations, but to effect a dispersion and decentralization of German industry which represents an actual or potential restraint of trade. That purpose is quite similar to that expressed in the Sherman Act. In addition, the fact that these combines or concentrations of economic power may dominate or substantially influence the policies of governmental agencies is another reason for decentralization.

(4) A recent decision by the Circuit Court of Appeals of the United States in the case of the U.S. v. The Aluminum Company of America, in an opinion by Judge Hand, summarized quite clearly the purposes of the Sherman Act. For the sake of brevity of this memorandum, reference is made to an extract from that opinion appearing in Tab B hereto attached.

(5) It has been observed, somewhat informally, that there is considerable misunderstanding by the other elements of Military Government as to what the decartelization program should do and when it should be accomplished. The Decartelization Branch recognizes that the present critical German economic situation may require the postponement of the implementation of deconcentration orders in certain instances where even a brief interruption of production cannot be presently countenanced, yet where decided benefits can, and should, be derived in time from establishing a more efficient competitive situation.

(6) It is also recognized that in a deconcentration proceeding, where an enterprise is directed to divest itself of certain ownership, there may be a great financial hardship to the owners of that enterprise if they are compelled to dispose of capital assets for current Reichsmarks within a short time. While this problem is undoubtedly receiving consideration of the Finance Division and other elements of Military Government, it is believed that no disposition of assets should be enforced in a decentralization action until credits can be obtained, with payments extended over a period of time to be made in the then current currency of Germany.

(7) In the establishment of a policy for decentralization, the question presents itself as to what extent excessive concentrations of economic power should be broken down, so that the resulting elements are not to be considered excessive concentrations. It is the view of the Decartelization Branch of OMGUS that BIDFC should determine the extent of the decentralization that must be accomplished, based upon the facts in each specific case.

(8) It is, therefore, suggested that the U.S. position on decentralization be summarized as follows:

1. All cartels, all combines and all excessive concentrations of German economic power which have the purpose or effect of res training trade must be terminated or dispersed.

2. Through the decentralization and dispersion of ownership and control of excessive concentrations of power of German industry, to eliminate these concentrations of economic power which may dominate or substantially influence the policies of government agencies or which could be used by Germany as instruments of political or economic aggression.

3. By such decentralization of excessive concentrations of economic power, to establish a free competitive economy for Germany.

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4. Payments to be made to the owners of decentralized enterprises shall, in so far as possible, be paid over a period of time, thus tending to minimize hardships resulting from an unstable German currency.

5. BIDEC will determine the time and manner of the carrying out of a deconcentration order, subject to review by the Board of Survey, the Board of Appeals and the Bipartite Board.

2. It is the concept of the U.S. Decartelization Branch that the decartelization program must be carried out in a rational manner, with a reasonable and realistic point of view, and yet accomplish the ultimate purpose of the Potsdam Agreement, the Directive of 15 July 1947, and U.S. Military Government Law No. 56.

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2 Incls:
1. Tab A (Procedure for Determination and Directive)
2. Tab B (Extract from decision of U.S. Circuit Court of Appeals)

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